No. 08-1301

In the Supreme Court of the United States

THOMAS CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on certain sex offenders who fail to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA), applies to petitioner, whose interstate travel occurred after his conviction for a covered sex offense, but before SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes a prosecution under Section 2250(a) of a person whose underlying sex offense and interstate travel predated SORNA's enactment, but whose failure to register occurred substantially after SORNA's requirements became applicable to him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 578. The opinion of the district court (Pet. App. 14a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 22, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted of failing to register or to

update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 37 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-13a.

1. On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA or Act), 42 U.S.C. 16901 *et seq.*, which created a new comprehensive national system and set of requirements for sex offender registration.[1] SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1), (3)-(5) and (7). A sex offender must "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a).

Section 16913 specifies SORNA's registration requirements, which are divided into two categories. First, under Section 16913(b), a sex offender must initially register following his conviction:

> **Initial registration**
>
> The sex offender shall initially register—
>
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

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[1] Before SORNA, and following the 1994 enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071 *et seq.*, all States had sex offender registration and notification programs. See *Smith* v. *Doe*, 538 U.S. 84, 89-90 (2003). SORNA was enacted to strengthen and replace these previously existing standards. See *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8895 (2007).

> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

42 U.S.C. 16913(b). Second, Section 16913(c) requires sex offenders who already have registered to keep their registrations current by updating their registration within three business days of any change in their "name, residence, employment, or student status." 42 U.S.C. 16913(c).

SORNA also delegates to the Attorney General the authority to further specify registration requirements in certain situations:

> **Initial registration of sex offenders unable to comply with subsection (b)**
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, which states that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. The Attorney General explained that "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convic-

tions predate the enactment of SORNA." *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8896 (2007). The interim rule thus served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." *Ibid.*

SORNA also creates a criminal offense for non-registration. Under that provision, a sex offender required to register under SORNA, who, *inter alia*, "travels in interstate or foreign commerce" and "knowingly fails to register or update a registration" as required under the Act may be punished by up to ten years of imprisonment. 18 U.S.C. 2250(a).

2. In 2004, petitioner was convicted of first degree sexual abuse in Alabama. When he was released from custody, petitioner registered in Alabama as a sex offender. In 2004 or 2005, petitioner moved to Indiana. On July 19, 2007, petitioner was discovered living in Fort Wayne, Indiana. As of that date, petitioner had not registered as a sex offender in Indiana. Pet. App. 14a-15a.

3. A federal grand jury charged petitioner with violating 18 U.S.C. 2250(a). Petitioner moved to dismiss the indictment, asserting that "his prosecution and any conviction would violate the Ex Post Facto Clause of the United States Constitution." Mot. to Dismiss 1. The district court rejected petitioner's ex post facto claim and denied his motion to dismiss the indictment. Pet. App. 19a. Petitioner then entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. *Id.* at 2a.

4. a. Petitioner presented a single issue on appeal: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5.

After oral argument, the Seventh Circuit consolidated for decision petitioner's appeal and that of another defendant, Marcus Dixon, whose underlying conduct was unrelated to petitioner's and whose trial court proceedings were conducted before a different judge. See Pet. App. 15a; 08-1438 Docket entry No. 31 (Dec. 22, 2008); 08-2008 Docket entry No. 17 (Dec. 22, 2008). Like petitioner, Dixon argued that his conviction for violating SORNA violated the Ex Post Facto Clause. Pet. App. 2a, 8a-12a. Unlike petitioner, however, Dixon also argued that, as a matter of statutory construction, "he did not violate [SORNA] because he traveled in interstate commerce before [SORNA] was passed." *Id.* at 4a. Cf. *id.* at 12a (stating that "the only ground of [petitioner's] appeal [was] that his conviction violated the ex post facto clause").

b. The court of appeals rejected petitioner's ex post facto claim and affirmed his conviction. Pet. App. 12a-13a. The court explained that the Ex Post Facto Clause is not violated "as long as at least one of the acts" that is "required for punishment" occurred after "the criminal statute punishing the acts takes effect." *Id.* at 8a-9a. The court determined that that standard was satisfied in petitioner's case because, in the court of appeals' view, petitioner had no obligation to register under SORNA until February 28, 2007—the date on which the Attorney General's interim rule was issued and seven months after SORNA took effect.[2] *Id.* at 12a. Petitioner "d[id] not

[2] The courts of appeals are divided on whether SORNA applied to all previously convicted sex offenders upon enactment or whether sex offenders whose predicate convictions predated SORNA did not become subject to the statute until the Attorney General issued his interim rule. Compare *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (former view), cert. denied, 129 S. Ct. 2431 (2009); and *United*

and c[ould] not complain that he was not given enough time to register in Indiana in order to avoid violating [SORNA]." *Ibid.* To the contrary, petitioner "admitt[ed] that he had still failed to [register] * * * almost five months after" his duty to register first arose. *Ibid.* The court of appeals thus rejected petitioner's ex post facto claim because "his violation was not complete when [SORNA] became applicable to him." *Id.* at 13a.

c. In contrast, the court of appeals reversed Dixon's conviction for violating SORNA and remanded with instructions to enter a judgment of acquittal. Pet. App. 3a-12a.

ii. The court of appeals first rejected Dixon's argument that, as a matter of statutory construction, SORNA is inapplicable to a person whose interstate travel predated the statute's enactment. Pet. App. 4a-6a. The court concluded that SORNA does not "require[] that the conviction of the sex offense that triggers the registration requirement postdate" the statute. *Id.* at 4a. The court also stated that "[t]he evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected," and it noted that this "concern is as acute in a case in

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States v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (same), cert. denied, 129 S. Ct. 2383 (2009), with Pet. App. 3a, 9a-10a (latter view), *United States* v. *Madera*, 528 F.3d 852, 857-859 (11th Cir. 2008) (same), and *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009) (same). This Court recently denied two petitions for a writ of certiorai that sought review of that question. See *Hinckley*, *supra* (No. 08-8696); *May*, *supra* (No. 08-7997). The division of authority about when SORNA first became applicable to sex offenders whose convictions predated the Act is immaterial here, however, because the court of appeals applied the standard that is more favorable to petitioner.

which the offender moved before [SORNA] was passed as in one in which he moved afterward." *Ibid.* (citing H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1 23-24, 26 (2005)). The court of appeals drew an analogy between SORNA and the federal law that prohibits convicted felons from possessing firearms that have traveled in interstate commerce, and it noted that, under that law, there is no requirement that the firearm have moved in interstate commerce after the law was enacted. *Ibid.* (citing *Scarborough* v. *United States*, 431 U.S. 563 (1977)).[3]

The court of appeals noted that the Tenth Circuit had reached a different conclusion, holding that, as a matter of statutory construction, SORNA "punishes only convicted sex offenders who travel in interstate commerce after [SORNA] was passed." Pet. App. 5a (citing *United States* v. *Husted*, 545 F.3d 1240, 1243-1244 (2008)). The court of appeals observed that "[t]he only ground * * * *Husted* gave for its ruling is that [SORNA] uses the present sense of the word 'travel,'" and it determined that *Husted*'s reading "create[d] an inconsistency" within the statute. *Ibid.* SORNA refers "to a convicted sex offender who 'travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.'" *Ibid.* (quoting 18 U.S.C. 2250(a)(2)(B)). The court of appeals explained that "[t]he word 'resides' does not describe an action, which begins at a definite time, but a status, which may have existed indefinitely." *Ibid.*

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[3] The court of appeals observed that it would be "a different case if the convicted sex offender's interstate travel took place before his conviction" for the predicate sex offense. Pet. App. 4a. The court determined that it need not decide whether SORNA would apply in such a situation, however, because Dixon's interstate travel post-dated his conviction. *Ibid.*

Accordingly, under the Tenth Circuit's reasoning, "a sex offender who has resided in Indian country since long before [SORNA] was passed is subject to [SORNA] but * * * someone who crossed state lines before [SORNA] was passed" is not subject to the statute. *Ibid.* The court of appeals determined that such a result would "make[] no sense, and g[ave] force to the Supreme Court's remark * * * referring to the analogous case of the felon in possession law[] that 'Congress' choice of tenses is not very revealing.'" *Ibid.* (quoting *Scarborough*, 431 U.S. at 571). The court of appeals thus "disagree[d] with the Tenth Circuit's interpretation" and concluded that Subsection (a)(2)(B) "is designed to establish a constitutional predicate for [SORNA's criminal provision] * * * rather than to create a temporal requirement." *Id.* at 6a.

ii. Having rejected Dixon's statutory claim, the court of appeals determined that his conviction violated the Ex Post Facto Clause. Pet. App. 8a-12a. As with petitioner, the court concluded that SORNA did not become applicable to Dixon until February 28, 2007, the date on which the Attorney General promulgated his interim rule. *Id.* at 9a-10a. The court noted that the indictment charged Dixon with failing to register "from on or about February 28, 2007 to on or about April 5, 2007." *Id.* at 10a. The court of appeals determined that, under those circumstances, Dixon's "failure to register * * * occurred before [SORNA] took effect with respect to" him. *Ibid.* The court viewed SORNA as "requir[ing] registration not on the day [SORNA] went into effect or a regulation by the Attorney General made [SORNA] applicable to a defendant, but within a reasonable time after that," *id.* at 10a-11a, and it concluded that the period between February 28, 2007, and April 5,

2007, was too short to permit a criminal prosecution for failure to register, *id.* at 10a-12a.

ARGUMENT

1. Petitioner contends (Pet. 8-25) that, as a matter of statutory construction, SORNA's criminal provision does not apply to a person whose interstate travel preceded SORNA's enactment.[4] That claim does not merit further review.

a. i. Petitioner's statutory claim is not properly before this Court because petitioner never made a statutory argument before either the district court or the court of appeals. Petitioner's motion to dismiss the indictment rested solely on the Ex Post Facto Clause. The motion itself stated that it was "based on Article I[,] Section 9, Clause 3 of the United States Constitution," and that petitioner "contend[ed] that his prosecution and any conviction would violate the Ex Post Facto Clause." Mot. to Dismiss 1. Petitioner's memorandum of law in support of that motion likewise raised only a constitutional claim. It asserted that, because petitioner's "travel in interstate commerce from Alabama to Indiana [occurred] prior to the passage of SORNA[,] * * * any imposition of punishment upon him under that act would be a violation of the ex post facto clause." Pet. Mem. in Supp. of Mot. to Dismiss 2-3; accord Pet. C.A. Br. 6 (stating that petitioner filed with the district court "a Motion to Dismiss and Memorandum of Law arguing that the prosecution * * * was a violation of the Ex Post Facto Clause of the Constitution"). The district court understood petitioner's motion to dismiss

[4] The same issues presented by this petition for a writ of certiorari also are presented by *Akers* v. *United States*, petition for cert. pending No. 08-10318 (filed May 4, 2009).

as based solely on constitutional grounds, see Pet. App. 15a, and the court's decision denying that motion does not address the statutory issue on which petitioner now seeks this Court's review, see *id.* at 16a-19a.

Before the court of appeals, petitioner likewise made clear that his argument was based exclusively on the Constitution. In his "Statement of Issues Presented for Review," petitioner described the only question before the Seventh Circuit as: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5. The Summary of Argument of petitioner's opening brief read, in its entirety:

> The Court erred in denying [petitioner's] Motion to Dismiss. The prosecution and conviction of [petitioner] are in violation of the Ex Post Facto Clause of the Constitution. Because he relocated from Alabama to Indiana in 2004 and 2005, before the passage of SORNA in 2006 and before its application to him in February 2007, [petitioner's] prosecution violates the Ex Post Facto Clause of the Constitution.

Id. at 8. The Conclusion section of petitioner's opening brief read as follows: "The Court erred in denying [petitioner's] Motion to Dismiss. The prosecution and conviction of [petitioner] under SORNA is a violation of Article I, Section 9, Clause 3 of the United States Constitution." *Id.* at 20; accord Pet. C.A. Reply Br. 2 (Summary of Reply Argument: "[Petitioner] argues that the cases relied upon by the Government do not support its position that the application of 18 U.S.C. § 2250 to [petitioner] does not violate the Ex Post Facto Clause.").

ii. Petitioner asserts briefly that he did "press[] the antecedent statutory interpretation issue" before the court of appeals by "citing numerous district court deci-

sions that avoided the ex post facto issue by resolving the statutory question in defendants' favor." Pet. 6 n.1 (citing Pet. C.A. Br. 16-17). That claim is without merit. Petitioner's court of appeals brief contained a string cite of 12 district court cases that was introduced by the following statement: "There have been a number of district courts which have addressed this issue and found that the statute violates the Ex Post Facto Clause." Pet. C.A. Br. 16. The brief further stated that, in three of those decisions, "the facts were the same as in the present case," because those defendants, like petitioner, "traveled before the enactment of SORNA in July 2006." *Id.* at 16-17. But the conclusion that the brief attributed to those decisions was likewise a constitutional one, *i.e.*, that "application of SORNA [to those defendants] would involve ex post facto considerations." *Id.* at 17.

Petitioner's court of appeals brief also stated that one district court decision observed that "Congress has used the word 'travels' as opposed to 'traveled,'" and it noted that another district court decision "concluded that a violation of [SORNA] is not a continuing offense but, rather, is complete when the defendant travels in interstate commerce and then fails to register within the prescribed time period." Pet. C.A. Br. 17. But petitioner's brief did not say that any of the cited decisions had been resolved on statutory (as opposed to constitutional) grounds, and, more importantly, the brief never asserted that SORNA did not reach petitioner's own conduct. The court of appeals thus was correct in stating that "the only ground of [petitioner's] appeal [was] that his conviction violated the ex post facto clause." Pet. App. 12a.

iii. Petitioner suggests that his statutory claim is properly before this Court because it was "passed upon"

by the court of appeals. Pet. 6 n.1 (quoting *United States* v. *Williams*, 504 U.S. 36, 41-44 (1992)). That claim is likewise without merit. The Seventh Circuit did not decide the statutory issue "in the present case." *Williams*, 504 U.S. at 43. To the contrary, the court of appeals addressed that issue in the course of resolving an entirely different case (*United States* v. *Dixon*) to which petitioner was not a party in either the district court or the court of appeals.

It is true that the court of appeals addressed the statutory question in the same opinion in which it also resolved petitioner's appeal. But that is only because the court of appeals, acting on its own motion, consolidated petitioner's appeal with Dixon's for purposes of decision. There would be no question that petitioner could not seek this Court's review of a statutory claim if the court of appeals had issued an opinion in Dixon's case addressing both the statutory and constitutional issues that Dixon raised and then issued a second opinion in petitioner's case rejecting petitioner's constitutional claim based on the court's analysis in *Dixon*. The court of appeals' entirely fortuitous decision to resolve both cases in a single consolidated opinion does not warrant a different result.

Petitioner also overstates the scope of *Williams*'s holding. *Williams* holds that there are circumstances in which "[i]t is a permissible exercise of [this Court's] discretion to undertake review of an important issue expressly decided by a federal court" in situations where "the petitioner did not contest the issue in the case immediately at hand." 504 U.S. at 44-45. But *Williams* makes clear that its holding is limited to circumstances in which the party seeking this Court's review "contest[ed] the issue * * * as a party to the recent pro-

ceeding upon which the lower courts relied for their resolution of the issue." *Id.* at 45. Petitioner was not a party in *Dixon*, and he identifies no previous case in which he was a party where he argued that, as a statutory matter, SORNA does not apply to travel that occurred before its enactment.

b. Even if the statutory question were properly before this Court, petitioner's claim would fail on the merits. As the court of appeals explained in resolving Dixon's appeal (Pet. App. 4a), the statutory text does not expressly require that the defendant's interstate travel occur after the statute's effective date. Echoing the Tenth Circuit's reasoning in *United States* v. *Husted*, 545 F.3d 1240, 1242-1247 (2008), petitioner asserts (Pet. 16-18) that Congress's use of the present tense "travels" in 18 U.S.C. 2250(a)(2)(B) demonstrates that SORNA's criminal prohibition is inapplicable to sex offenders whose interstate travel occurred before its effective date. But as the court of appeals correctly explained, "the present tense is commonly used to refer to past, present, and future all at the same time." Pet. App. 6a (quoting *Coalition for Clean Air* v. *Southern Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992), cert. denied, 507 U.S. 950 (1993)).[5] As a result, "Congress' choice of tenses is not very revealing" with respect to SORNA. Pet. App. 5a (quoting *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977)). Cf. 1 U.S.C. 1 ("*unless the context indicates otherwise* * * * words used in the present tense include the future as well as the present") (emphasis added).

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[5] In contrast, the statute at issue in *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) (see Pet. 16), used "the past and present perfect tenses" in describing the relevant conduct.

Petitioner offers no response to the court of appeals' observation that his proposed construction of the statute would generate an "inconsistency" and produce results that "make[] no sense." Pet. App. 5a. The relevant clause refers to a defendant who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. 2250(a)(2)(B). The latter portion of this clause makes clear that SORNA's criminal prohibition applies to "old residents of Indian country, as well as new entrants." Pet. App. 5a. Accordingly, petitioner's proposed interpretation of the word "travels" in the former portion of that same clause would create a regime in which "a sex offender who has resided in Indian country since long before [SORNA] was passed [would be] subject to [SORNA] but not someone who crossed state lines before [SORNA] was passed." *Ibid.* In contrast, the court of appeals' interpretation reads Subsection (a)(2)(B) as a coherent whole, by viewing the entire Subsection as "establish[ing]" various "constitutional predicate[s] for" for federal legislative authority "rather than" imposing "a temporal requirement" with respect to interstate or foreign travel. *Id.* at 6a.

As the court of appeals observed, "[t]here is a close analogy" between SORNA and "the federal criminal law * * * that punishes felons who possess guns that have moved in interstate commerce." Pet. App. 4a. In *Scarborough*, this Court determined that "the purpose of [that statute] was to proscribe mere possession but * * * there was some concern about the constitutionality of such a statute." 431 U.S. at 575. In light of that purpose, *Scarborough* held that the felon-in-possession statute imposes "no more than a minimal nexus requirement" under which the government "need prove only that the firearm possessed by the convicted felon trav-

eled at some point in interstate commerce." *Id.* at 568, 577. As the court of appeals correctly reasoned, just as "[t]he danger posed by * * * a felon [who possesses a firearm] is unaffected by when the gun crossed state lines," the government and public interests served by monitoring the whereabouts of a convicted sex offender do not vary depending on whether he moved to a new jurisdiction before or after SORNA took effect. Pet. App. 4a.

Petitioner errs in asserting that "limiting the application of" SORNA's criminal provision "to post-enactment travel does not frustrate the overall intent of Congress" given the existence of various non-criminal provisions of SORNA itself, as well as "other existing enforcement mechanisms." Pet. 20-21. The purpose of SORNA, however, was to "establish[] a comprehensive national system for the registration of sex offenders," 42 U.S.C. 16901, and thus address "gaps and problems with existing Federal and State laws, as well as implementation of [existing] sex offender registration and notification programs." H.R. Rep. No. 218, *supra*, at 3, 23. Congress's decision to subject sex offenders who fail to comply with SORNA's registration requirements to "a felony criminal penalty" was an integral part of furthering that purpose. *Id.* at 26.

Petitioner also invokes the presumption against retroactivity, the constitutional avoidance canon, and the rule of lenity. Pet. 22-25. Petitioner's first two arguments merge because, as the court of appeals correctly explained, in criminal cases, the "policy against interpreting legislation to make it retroactive * * * is stated in the ex post facto clause." Pet. App. 6a. All of this Court's statements that petitioner cites about the

presumption against retroactivity were made in civil cases. See Pet. 22-23.

The constitutional avoidance canon is inapplicable here. That canon applies only when the most natural reading of a statute raises "serious constitutional doubts," *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005), and, in this case, it does not. See pp. 18-20, *infra*; Pet. App. 12a-13a. Petitioner's assertion (Pet. 24) that the court of appeals' interpretation of SORNA raises "serious constitutional doubts" because some district courts have held that such a construction would violate the Ex Post Facto Clause lacks merit. This Court has declined to apply the constitutional avoidance canon even in situations where multiple Justices were of the view that the statute, as construed by the Court, violated the Constitution. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545, 555-565 (2002).

Petitioner's rule of lenity argument also fails. The Court rejected a similar argument in *Scarborough*, explaining that the rule of lenity is triggered "only when [a court] is uncertain about the statute's meaning," even "[a]fter seizing every thing from which aid can be derived." 431 U.S. at 577 (brackets in original) (internal quotation marks and citation omitted). For the reasons explained above, there is no "grievous ambiguity" here that would warrant resort to the rule of lenity. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998).

c. Petitioner asserts that this Court should grant a writ of certiorari because "there is a clear conflict in the circuits" about "whether SORNA applies to persons whose travel in interstate commerce took place prior to passage of the statute." Pet. 9. As the court of appeals acknowledged (Pet. App. 5a), its conclusion in *Dixon* that SORNA "does not require that the defendant's

travel postdate the Act," *id.* at 4a, conflicts with the Tenth Circuit's holding in *Husted* that "SORNA does not apply to [a defendant] whose interstate travel was complete prior to [SORNA's] effective date," 545 F.3d at 1247. But no other court of appeals has squarely resolved the issue.[6] Whether or not the conflict may merit this Court's review in an appropriate future case, it provides no warrant for granting a writ of certiorari in a case in which the defendant never raised the statutory claim on which he now seeks this Court's review and chose instead to limit his presentation to a constitutional claim that assumed a reading of the statute that was directly contrary to the one he now embraces.[7]

2. Petitioner also renews his contention that his prosecution for violating SORNA violated the Ex Post

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[6] Petitioner suggests that the Eleventh Circuit "arguably agrees" with the Seventh Circuit's interpretation of SORNA, Pet. 9, but he does not contend that the Eleventh Circuit's decision in *United States* v. *Dumont*, 555 F.3d 1288 (2009) (per curiam), petition for cert. pending, No. 08-10087 (filed Apr. 24, 2009), conflicts with the Tenth Circuit's decision in *Husted*. Petitioner acknowledges that the language from *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009), on which he relies was "dicta" (Pet. 11), and neither the Eighth Circuit's subsequent unpublished decision in *United States* v. *Hulen*, 309 Fed. Appx. 79, 79 (2009) (per curiam), nor *Hulen*'s description of the government's litigating position in that case transforms *May*'s dictum into a holding. Finally, although petitioner asserts that the Fourth Circuit's ultimate "conclusion" in *United States* v. *Hatcher*, 560 F.3d 222 (2009), "necessarily conflicts with the Seventh Circuit's opinion" in *Dixon*, petitioner acknowledges that *Hatcher* relied on a provision—42 U.S.C. 16913(d)—that the Seventh Circuit did not even consider in *Dixon*. Pet. 11 n.4.

[7] Petitioner also references "pervasive confusion in the district courts." Pet. 9. Such "confusion" in non-precedential decisions provides no justification for this Court to grant a writ of certiorari. Cf. Sup. Ct. R. 10(a).

Facto Clause. Pet. 28-32. That claim likewise does not merit further review.

a. Petitioner acknowledges that the court of appeals' rejection of his ex post facto claim does not conflict with the decisions of another court of appeals. See Pet. 25. That fact alone warrants the denial of the petition for a writ of certiorari.[8]

b. In any event, the court of appeals correctly rejected petitioner's ex post facto claim. "The critical question" for ex post facto purposes "is whether [a] law changes the legal consequences of acts completed before its effective date." *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981). As the court of appeals correctly explained, the relevant criminal conduct in this case "*was not complete* when [SORNA] became applicable to [petitioner]." Pet. App. 13a (emphasis added).

Regardless whether pre-SORNA law also required petitioner to register as a sex offender upon his pre-SORNA move to Indiana, see Pet. 28, SORNA imposed a new and additional duty to do so. Cf. Pet. 4 (acknowledging that SORNA "created a new, national sex offender registry"). The court of appeals determined that the duty to register created by SORNA did not apply to petitioner before February 28, 2007, which was seven months after SORNA was enacted. Pet. App. 3a-4a, 9a-10a; see note 2, *supra*. The court of appeals further determined that SORNA only required petitioner to register "within a reasonable time after" February 28, 2007. *Id.* at 11a. Because the Ex Post Facto Clause is not implicated "as long as at least one of the acts [required for

[8] Petitioner asserts that "[t]he district courts are deeply divided on" the ex post facto question. Pet. 25. As with respect to petitioner's statutory issue, see note 7, *supra*, a division in non-precedential decisions does not merit this Court's review.

punishment] took place" after the enactment of the relevant statute, the court of appeals correctly held that petitioner's "rights under the ex post facto clause were not violated" here. *Id.* at 8a-9a, 13a.[9]

Petitioner also contends (Pet. 29-32) that the court of appeals erred in viewing a failure to register under SORNA "as a 'continuing offense.'" Pet. 29 (quoting Pet. App. 2a). That is a statutory argument, not a constitutional one, and, as explained previously, no questions of statutory interpretation are properly before this Court. See pp. 9-13, *supra*. At any rate, the court of appeals did not rest its ex post facto analysis on a finding that petitioner's violation of SORNA began before, but then continued until after, the date on which the statute took effect with respect to him. Cf. *Toussie* v. *United States*, 397 U.S. 112, 113-114 (1970) (addressing whether a defendant whose violation of the relevant statute was complete in 1959 could still be prosecuted in 1967 notwithstanding a five-year statute of limitations on the theory that every day he failed to register for the draft constituted an additional violation of the statute).

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[9] Accord *United States* v. *Russell*, 186 F.3d 883, 885 (8th Cir. 1999) (holding that the Deadbeat Parents Punishment Act of 1998, 18 U.S.C. 228, did not violate the Ex Post Facto Clause because the statute did not punish past accrual of support payments, but post-enactment failure to pay); *United States* v. *Alkins*, 925 F.2d 541, 549 (2d Cir. 1991) ("Since appellants permitted the final element of the crime to occur after the effective date of the statute, their mail fraud convictions did not violate the *ex post facto* clause."); *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978) (holding that application of 18 U.S.C. 1962(c) would not violate the Ex Post Facto Clause so long as at least one act in the "pattern of racketeering activities" occurred after the enactment of the statute); *United States* v. *Campanale*, 518 F.2d 352, 364-365 & n.34 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (same).

Instead, the court of appeals determined that petitioner's violation of SORNA was not yet "complete" when the statute first became applicable to him and only was completed when petitioner failed to register within a reasonable time after the Attorney General's interim rule took effect. Pet. App. 13a.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner observes that "several district courts have also found that SORNA exceeds Congress' power under the Commerce Clause." Pet. 26 n.11. Petitioner raised no Commerce Clause challenge before either the district court or the court of appeals, and he does not ask the Court to grant a writ of certiorari to consider one. This Court previously has denied at least one petition for a writ of certiorari that asserted that SORNA exceeded Congress's authority under the Commerce Clause. See *May, supra* (No. 08-7997).